

## STATE OF VERMONT

## HUMAN SERVICES BOARD

In re ) Fair Hearing No. A-07/10-341  
 )  
 Appeal of )

## INTRODUCTION

The petitioner appeals a decision by the Department for Children and Families, Family Services Division, to substantiate petitioner for risk of harm-sexual to S.

## Procedural History

The petitioner filed for fair hearing on July 22, 2010. An initial telephone status conference was held on August 2, 2010.

The next telephone status conference was held on October 15, 2010 in which the Department stated its intent to file a Motion for Summary Judgment. A briefing schedule was set.

The Human Services Board entered an Order on April 11, 2011 denying the Department's Motion for Summary Judgment and remanding the case to the Hearing Officer.

Telephone status conference was held on May 3, 2011. Petitioner was in the process of obtaining a forensic evaluation. Subsequent telephone status conferences took place August 2, October 4 and December 6, 2011 and January 31, and April 3, 2012. During this time, petitioner ran into

difficulties obtaining Department of Correction (DOC) records and then the Department needed time to obtain the forensic report and depose the psychologist. A telephone status conference was held on June 5, 2012 and the case set for hearing.

Hearing was held on July 17, 2012. The parties stipulated to the admission of petitioner's 1988 conviction for second degree murder. The following Exhibits were entered into evidence:

State's 1: Department Note of February 22, 2010 meeting with petitioner, KG (DOC) and AT (paragraph 13 of investigative report).

Petitioner's 1: Static-00R Coding Form dated August 5, 2010.

Petitioner's 2: Vermont Assessment of Sex Offender Risk dated August 5, 2010.

The Department presented testimony from (1) KG, Director, Vermont Treatment Program for Sexual Abuse (VTPSA), at DOC, (2) AC, Department investigative social worker, and (3) JS, Department supervisor of the intake/assessment unit. Petitioner rested his case after the close of the Department's case.

The decision is based upon the evidence adduced at hearing.

FINDINGS OF FACT

1. The petitioner is under the supervision of the Department of Corrections (DOC) due to a 1988 second-degree murder conviction. The conviction is based on his sexual assault and murder of his seven-year-old female cousin. Petitioner was fourteen years old when he perpetrated this crime.

2. Petitioner will be under DOC supervision for the remainder of his life. Petitioner is currently on furlough in the community.

3. While incarcerated, petitioner availed himself of treatment and programming for sex offenders including treatment at Woodside, the Pines (out of state program), Vermont Treatment Program for Sexual Abuse, and other programs offered by DOC. Petitioner also received treatment and therapy in the community. Petitioner successfully completed his treatment programs.

4. During June 2006, KG inherited petitioner's case. During the periods petitioner was in the community, KG was the lead probation officer.

5. KG supervised sex offenders for six years before becoming Director of the Vermont Treatment Program for Sexual Abuse (VTPSA). KG has been trained to do risk assessments and profiles of sex offenders. She has been a supervisor of

the sex offender team at DOC. She has completed 25-30 presentence investigations and risk assessments for sex offenders. KG has expertise regarding sexual offenders and their risk factors.

6. KG testified about the chronology of events that led to the report to the Department and the Department's subsequent substantiation of petitioner for risk of sexual harm to S. KG gave nuanced testimony distinguishing between the DOC concerns regarding petitioner's risk to reoffend and whether petitioner posed a specific risk of sexual harm to S. KG's testimony is credible and persuasive.

7. As part of petitioner's reintegration into the community, he started working in the community during 2009 although he remained in a correctional facility.<sup>1</sup> He was part of a transitional program in which he could leave the facility first to look for work and then to work once employment was found.

8. Petitioner was furloughed on January 22, 2010. His furlough included a number of conditions of release (COR). The COR included the following provisions that are specific

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<sup>1</sup> This was not petitioner's first attempt at community reintegration or parole. Past efforts were not successful due to petitioner's instability and lack of life skills, including financial mismanagement leading to loss of housing.

to sex offenders: (1) no contact with minors without the approval of his probation officer and (2) no relationships where there are minors without the approval of his probation officer. Petitioner agreed to the COR and signed the COR.

9. Starting in 2009, petitioner found employment with a cleaning company. His supervisor was KB. Petitioner's work site was a fitness club.

10. KB has a son, S, who was nine years old at the time of the substantiation.

11. At times, KB brought her son S to the work site with her because she did not have child care. KB called KG during January 2010 and explained that she brought her son to her work site on occasion including times that petitioner was at work.

KG explained this type of incidental contact was not a problem provided that KB supervised her son and that petitioner was not alone with her son. KG subsequently informed petitioner that he was not to have unsupervised contact with S.

KG did not know that petitioner and KB were in a romantic relationship when KB called her.

12. KG learned about the romantic relationship between petitioner and KB on or about February 11, 2010 when

petitioner contacted her and came to an appointment with KB. Petitioner had a workplace issue because a patron of the fitness club complained to the management about petitioner's presence.

KB was a manager at the cleaning company. With her boss, a decision was made to move petitioner from his job and try to find another placement within the cleaning company. KB planned to add petitioner's work to her duties and then give petitioner monies representing his share of the work. KG asked why KB would do this; KB said she loved petitioner.

KG was shocked by the news. KG was concerned about petitioner not following through with his COR and not being honest in his relationship with DOC. Petitioner's actions raised red flags for KG about his risk to reoffend.

At the time KG found out, she thought S was KB's only child. At the time, KG made a comment that it could have

been worse if KB had a daughter.<sup>2</sup> Petitioner's risk of sexual harm extended to girls, not to boys.

KG told petitioner he could not have any contact with children. KG told petitioner he could no longer have the supervised contact he had with his nieces and nephews.

13. Petitioner was alone with S on several occasions and admitted this to KG. Petitioner helped S with homework when KB was working. There was one overnight visit with petitioner, KB, and S.

14. Petitioner was incarcerated for ten days for a violation of his COR because petitioner had contact with a minor (S) without probation officer approval and because petitioner entered into a relationship with KB who had minor children without probation officer approval.

15. As a mandated reporter, KG reported the contact between petitioner and KB's children to the Department.

16. Petitioner's case was assigned to AT who investigated the case including meeting together with

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<sup>2</sup> KB has a daughter but she did not and does not have custody of her daughter although there appears to have been some contact between petitioner and KB's daughter during KB's parent/child contact. KG was consistent in her testimony that she was concerned about the risk petitioner poses of sexual harm to girls and that finding out about KB's daughter caused her further concern. The above substantiation does not involve KB's daughter.

petitioner and KG, interviewing KB and interviewing S. AT was supervised by JS.

AT did not have petitioner's treatment records at the time she recommended substantiation. A major concern for the Department was the petitioner not following his COR, particularly the provisions of no contact with minors, and the petitioner's minimization of his 1998 crime during a meeting AT had with petitioner and KG.

AT testified that S's gender was not a factor in making the decision to substantiate. Because petitioner's risk of sexual offending is to girls, not boys, the failure to consider gender and explain how petitioner is a sexual risk to boys undercuts the Department decision to substantiate for risk of sexual harm to S.

17. The petitioner's behavior created DOC issues. KG had a number of concerns regarding petitioner and whether he was a risk to reoffend because of his behavior during this period of time. A key factor for KG was petitioner's compliance with the COR, his honesty dealing with DOC, and his mental instability.

These concerns are different than concerns that petitioner placed S at risk of sexual harm. Many of KG's concerns for S stem from the potential impacts upon S of



petitioner becoming part of his life and then having no contact and stem from the potential impacts to S of petitioner's anger. Although repeatedly questioned, KG did not believe that the petitioner posed a high risk for sexual harm to S. Petitioner was not a specific risk of sexual harm to boys.

ORDER

The Department's decision is reversed.

REASONS

The Department for Children and Families is required by statute to investigate reports of child abuse and to maintain a registry of all investigations unless the reported facts are unsubstantiated. 33 V.S.A. §§ 4914, 4915, and 4916.

The pertinent sections of 33 V.S.A. § 4912 define abuse and harm as follows:

(2) An "abused or neglected child" means a child whose physical health, psychological growth and development or welfare is harmed or is at substantial risk of harm by the acts or omissions of his or her parent or other person responsible for the child's welfare. An "abused or neglected child" also means a child who is sexually abused or at substantial risk of sexual abuse by any person.

. . .

(4) "Risk of harm" means a significant danger that a child will suffer serious harm other than by accidental

means, which harm would be likely to cause physical injury, neglect, emotional maltreatment or sexual abuse.

. . .

(8) "Sexual abuse" consists of any act or acts by any person involving sexual molestation or exploitation of a child included but not limited to incest, prostitution, rape, sodomy, or any lewd and lascivious conduct involving a child. . .

In addition, Department policy further defines risk of sexual harm in Family Services Policy 56 as:

Risk of sexual abuse substantiated when:

1. the alleged perpetrator's history of sexual abuse or offenses, the nature of the abuse or offense and the history of treatment indicate that he or she is still a substantial risk to the alleged victim; and/or
2. the person responsible for the child's welfare is unable or unwilling to protect the child from harm.

The perpetrator is considered to be the person whose behavior or history poses a risk to the child.

The Department has the burden of showing that the evidence supports a finding that petitioner's actions constitute a significant danger of sexual harm to a specific child, S, not that the petitioner may be a risk to others.<sup>3</sup>

The Department was correct to investigate the report given the number of red flags including the petitioner's

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<sup>3</sup> In cases of sexual abuse or risk of sexual harm, the Department can investigate anyone. In other cases, the Department can investigate "a person responsible for a child's welfare"; petitioner does not fit into this category. 33 V.S.A. § 4912(5) and (8).

history, the petitioner's noncompliance with his COR, and the petitioner's lack of forthrightness to his probation officer, KG. The Department's concern is understandable given the heinous nature of petitioner's crime and the Department's fear that other children may be placed at risk.

But, there needs to be a nexus between the petitioner's behavior and whether that behavior placed a specific child at risk of sexual harm before petitioner can be substantiated. The evidence does not support a finding that petitioner placed S at substantial risk of sexual harm.

KG worked as petitioner's probation officer for six years. She is knowledgeable about petitioner's history including his treatment history and his efforts to integrate into the community. She raised concerns about petitioner's ability to integrate into the community successfully, especially petitioner's life skills. But, KG did not raise concerns that petitioner placed S at risk of sexual harm.

In fact, KG consistently stated, upon repeated questioning by the Department's attorney, that petitioner did not place S at substantial risk of sexual harm because petitioner poses such a risk to girls, not to boys.

Based on the evidence, the Department's decision is reversed. 3 V.S.A. § 3091(d), Fair Hearing Rule No. 1000.4D.

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